Nos. 90-1361, 90-1484

In The

Supreme Court of the United States

October Term, 1990

IN RE HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP AND CHOPIN ASSOCIATES,

Debtors.

HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, and CHOPIN ASSOCIATES, and THE UNITED STATES OF AMERICA,

Petitioners,

vs.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and THE BANK OF NEW YORK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI FILED BY THE DEBTORS AND THE UNITED STATES OF AMERICA

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QUESTION PRESENTED

Whether a trustee appointed post-confirmation to a creditors' trust is responsible for filing federal tax returns and paying federal income taxes on gain realized from the sale of the Debtors' real property where the confirmed and substantially consummated plan of reorganization which created the trust does not provide for the payment of these taxes, the government did not object to the plan or appeal the confirmation order, and the Internal Revenue Code contains no requirement that such a trustee is responsible for these taxes?

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The opinions relevant to the Petitions for Writs of Certiorari are the September 18, 1990 decision of the United States Court of Appeals for the Eleventh Circuit, *United States v. Smith (In re Holywell Corp.)*, 911 F.2d 1539 (11th Cir. 1990), App. A at 1a;[1] the July 31, 1989 Memorandum Opinion of the United States District Court for the Southern District of Florida, *United States v. Smith (In re Holywell Corp.)*, No. 88-0795 slip op. (S.D. Fla. July 31, 1989), App. B at 17a; and the April 28, 1988 Final Judgment and separate Findings of Fact and Conclusions of Law of the United States Bankruptcy Court for the Southern District of Florida, *Smith v. United States (In re Holywell Corp.)*, 85 Bankr. 898 (Bankr. S.D. Fla. 1988), App. C at 28a and App. D at 38a, respectively.

STATEMENT OF JURISDICTION

The Petitioners seek review of the decision of the Eleventh Circuit Court of Appeals affirming decisions of the bankruptcy court and the district court which held that the Miami Center Liquidating Trust is not responsible for filing tax returns or paying the Debtors' income taxes, if any, on gain realized from the sale of realty, the proceeds of which were used to fund a creditors' plan in a bankruptcy reorganization. The Petitioners have failed to establish any jurisdictional basis for granting the writ. They have demonstrated neither the existence of a conflict between the decision of the United States Courts of Appeals for the Eleventh Circuit and any decision of this Court or other Courts of Appeals, nor an important question of federal law which has not been, but should be settled by this Court. *See* Sup.Ct.R. 10.1(a)-(c). The Court also lacks jurisdiction because the issue is moot. Accordingly, the Petitions for Writs of Certiorari should be denied.

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[1] References to the Petitioner-Debtors' appendix will be by the symbol "App. ___." References to the appendix attached hereto will be by the symbol "Liquidating Trustee's App. ___."

STATEMENT OF THE CASE

Introduction

The Petitioners are five related Debtors[2] who filed simultaneous voluntary Chapter 11 petitions nearly six years ago in the United States Bankruptcy Court for the Southern District of Florida, and the United States of America (hereinafter "government"). This is the Debtors' eighth attempt at review in this Court. Each previous attempt was unsuccessful,[3] as was their attempt to obtain a stay of the Eleventh Circuit's mandate in this case.[4]

The Petitioners seek review of the Eleventh Circuit's affirmance of a bankruptcy court order which determined that the Miami Center Liquidating Trust is not responsible for filing tax returns or paying income taxes, if any, on gain realized from the sale of realty used to fund a bankruptcy plan of reorganization because the confirmed, substantially consummated plan does not provide for payment of any such taxes and because the trust itself is not a taxable entity. The Petitioners' statement of the case selectively focuses only on part of the lower court's decision, overlooking those findings and conclusions which preclude review by this Court. The Petitioners' respective statements of the case are therefore incomplete and require elaboration.

In August 1985, the bankruptcy court confirmed a plan of reorganization proposed by the Bank of New York (hereinafter "bank").[5] Its central features were:

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[2] The Petitioner-Debtors are Theodore B. Gould and four entities he either owns or entirely controls – Holywell Corporation, Miami Center Corporation, Miami Center Limited Partnership and Chopin Associates.

[3] Case numbers 87-1988, 87-1989, 88-80, 89-864, 89-708, 89-917 and 90-676.

[4] On January 22, 1991, Justice Kennedy denied the Debtors' application for a stay of the mandate and to reinstate an order enjoining disbursements by the trust.

[5] The Debtors' creditors overwhelmingly approved the bank's plan over one proposed by the Debtors. *Miami Center Limited Partnership v.*

(Continued on following page)

(a) substantive consolidation of the bankruptcy estates of the five Debtors;

(b) creation of the Miami Center Liquidating Trust, consisting of all of the Debtors' assets, as defined by 11 U.S.C. Section 541(a), including the Miami Center and the proceeds from the sale of the Washington properties;

(c) appointment of a trustee of the Miami Center Liquidating Trust (hereinafter "Liquidating Trustee");

(d) the purchase of the Miami Center by the bank for $255.6 million, to be paid by cancellation of the Debtors' obligations to the bank (some $242 million), plus payment in cash of $13.6 million; and

(e) the bank's release of approximately $30 million in cash collateral, representing proceeds from the pre-confirmation sale of the Washington properties, to the Liquidating Trust for payment of allowed claims.

The plan, as Petitioners acknowledge, did not provide for the payment of income taxes.[6] (Debtors' Petition for Writ of Certiorari at 5). The Debtors' appeal of the bankruptcy court's August 8, 1985 confirmation of the plan was unsuccessful. *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). The government was a creditor for other tax claims; it received notice of the proceedings, never objected to the

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(Continued from previous page)

Bank of New York, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46 (1988). Like the bank's plan, the Debtors' reorganization proposal provided for sale of the Miami Center property and did not provide for payment of federal income taxes on gain realized from the sale. App. C at 29-30a.

[6] One of the Debtors' arguments in the appeal of the confirmation order on the merits was that the plan should not have been confirmed because it did not provide for the payment of federal taxes.

disclosure statement or the plan, voiced no objection to confirmation, did not vote against the plan, and did not appeal the order of confirmation. App. C at 30a.

Course of Proceedings

The Liquidating Trustee filed an adversary complaint in the bankruptcy court against the government, the bank, and the Debtors, seeking a declaratory decree of the question of whether the Miami Center Liquidating Trust was obligated to file a tax return on behalf of the Debtors and to pay federal income taxes due, if any, on gain realized from the sale of what is known as the Washington properties and the Miami Center. The Liquidating Trustee also sought alternative relief against the bank in the event the trust was obligated to report and pay federal income taxes on the grounds that the bank indemnified the trust and the bank, as the proponent of the plan, was responsible for providing the means necessary for consummation of the plan. Liquidating Trustee's App. A at 1a.

The bankruptcy court entered judgment determining the Trust had no such tax obligations, App. C at 28a, and, accordingly, did not reach the claim against the bank or any issue of priority concerning payment of tax claims.

The government and the Debtors appealed to the district court and obtained a stay which precluded the trust from paying any of its creditors.[7] Liquidating Trustee's App. B at 8a. The district court thereafter affirmed the bankruptcy court's decision and vacated the stay. App. B at 17a.

The government and the Debtors next appealed to the Court of Appeals for the Eleventh Circuit and obtained a continuation of the stay from that court, which again prevented the trust from disbursing assets to pay its remaining

[7] At the time the stay was entered, the Liquidating Trustee had already paid millions of dollars to hundreds of creditors, pursuant to the confirmed plan, without objection from the government. Some prepetition creditors and a number of trust administrative creditors remained to be paid while the stay was in effect.

creditors. Liquidating Trustee's App. C at 10a. The Circuit Court of Appeals thereafter affirmed the decision of the district court, App. A at 1a, and denied the Debtors' motion for stay of the mandate, as did this Court, acting through Justice Kennedy. Liquidating Trustee's App. D at 12a and E at 15a. The government sought neither rehearing in the Eleventh Circuit nor a stay of the mandate from either the Eleventh Circuit or this Court.

Statement of the Facts

After filing their Chapter 11 petitions in August 1984, the Debtors sought and received authority to consummate prepetition contracts for the sale of what is referred to as the Washington properties. App. C at 29a. In accordance with a bankruptcy court order, the sales closed and the Debtors deposited the proceeds in controlled accounts subject to the further order of the bankruptcy court. The bankruptcy court thereafter determined those proceeds were subject to the bank's lien as cash collateral. Neither the government nor the Debtors appealed this order. The government never filed a proof of claim or a request for payment, and never sought resolution of whether and to what extent taxes were due as a result of the sale of the Washington properties.

Shortly thereafter, the Debtors and the bank submitted competing plans of reorganization. In the respective disclosure statements, each included the use of the proceeds from the sale of the Washington properties as part of the plan and each provided for the sale of the Miami Center, but neither provided for the payment of federal income taxes due, if any, on gain realized from the sale of those properties. App. C at 29-30a. The government received copies of the competing plans and disclosure statements. App. A at 2a. The bank's plan was confirmed and substantially consummated. *Miami Center*, 838 F.2d at 1552. Each of the three courts that has reviewed the tax issue has emphasized the government's total failure to protect its own interest; the fact that the government allowed creditors to vote for the bank's plan relying on the monies available for payment without regard to the payment

of income taxes; and the government's failure to appeal the order of confirmation of a plan which made no provision for the payment of taxes on gain from the sale of the Washington and Miami properties. In addition, the Petitioners have overlooked the conclusion by all three courts that this belated challenge of the failure of the plan to provide for payment of income taxes is now entirely moot because the plan has been substantially consummated and cannot be undone. App. A at 6-7a; B at 20-21a; C at 36-37a.

The Debtors (but not the government) objected to the bank's plan of reorganization in part because it failed to provide for the payment of taxes on the sale of the Debtors' realty, but their appeal of the confirmation order was entirely unsuccessful. At the trial of the adversary proceeding which led to these Petitions for Writs of Certiorari, the Debtors introduced as evidence the bankruptcy court's pre-confirmation statement to them about alleged tax consequences of the proposed plan:

> The last point I want to touch on are the tax consequences. In this area I readily concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision that we are talking about right at the moment. **If a modification of this plan or any other adjustment can be made to alleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored and I would, so long as I have the discretion to do so, intend to accomplish that result and I don't mean to foreclose it today.** I think all of us have recognized in our discussion this morning that there might be tax consequences, we are not certain if we have considered all that we could do to alleviate the adverse tax consequences, and if somebody will bring them to our attention, through you, I imagine Mr. Kent [Debtors' counsel] we would want to reconsider that, but on the basic question of whether or not I should doom the bank's plan in its present form by just saying that there is no legal predicate here and

> no justification for me to allow the version of consolidation that is embodied in that plan, I am not willing to take that step today and I am willing to go along with the approach the bank has offered.

Liquidating Trustee's App. F at 17-18a (emphasis supplied). No such modification was ever requested to take potential tax liability into account. There never was evidence adduced of the amount of the tax liability which might result, despite the bankruptcy court's express invitation to the Debtors to do so. The bankruptcy and district courts both approved confirmation of that plan, and millions of dollars were paid to hundreds of creditors without the government once raising the issue of tax consequences.

The present effort to hold the Liquidating Trustee personally liable for the payment of these taxes is sought even though neither the Debtors nor the government ever sought such relief in the bankruptcy court in the form of a counterclaim to the original adversary proceeding for declaratory relief, or by any other proceeding before the appeals from the April 28, 1988 order. (Debtors' Petition for Writ of Certiorari at 11).[8] Indeed, the government never filed a proof of claim for the income taxes in question, never filed an administrative request for payment, never sought a jeopardy assessment or determination of the taxes now claimed to be due, and never sought appellate review of the order confirming the plan of reorganization.

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[8] The Debtors have repeatedly tried to hold the Liquidating Trustee responsible for the taxes. *See Gould v. Smith*, No. 88-6187 slip op. (11th Cir. July 7, 1989); *Twin Development Corp. v. Smith*, No. 87-0037 slip op. (W.D. Va. Nov. 15, 1988); *Holywell Corp. v. Smith*, No. 87-5195 slip op. (11th Cir. March 18, 1988). Presently pending in the Eleventh Circuit, case no. 90-5831, is a consolidated appeal by the Debtors and a number of their wholly-owned subsidiary companies in which they again seek, *inter alia*, to require the Liquidating Trustee to establish reserves for payment of the taxes at issue. In a number of these proceedings, the Debtors (and in this petition the government, as well) assert that the Trustee is personally liable for failure to pay the taxes in question.

The government's conclusion that the "taxes would evidently be substantial" (Petition for Writ of Certiorari at 6, n.4) and the Debtors' conclusions as to the amount of taxes due (Petition for Writ of Certiorari at 6, n.5) are wholly speculative and without any record support. There was no evidence of the amount of taxes claimed to be owed introduced as evidence at the trial. These conclusions are *dehors* the record and should be stricken. *See Harmelin v. Michigan*, 59 U.S.L.W. 3324 (October 30, 1990) (Order striking references to facts that, while relevant, were outside the record, and requiring party to revise and reprint its brief).

The confirmed plan fixes the Liquidating Trustee's responsibilities. App. A at 3a. He is only authorized to pay allowed claims and required to return all remaining funds to the Debtors. He has no discretion under the plan as to the identity, amount or priority of creditors. He is not authorized to do anything more than carry out the plan provisions. In addition, he lacks the plenary avoidance powers of a Title 11 bankruptcy trustee provided under Bankruptcy Code Sections 544, 547, 548 and 554. App. F at 42a.

The Petitions for Writs of Certiorari focus almost entirely on the Eleventh Circuit's determination that the trust is not a taxable entity under the Internal Revenue Code. In fact, the Eleventh Circuit's opinion is far broader than that; it determined the plan does not permit payment of the taxes in question, and any attempt to modify the confirmed plan in order to require such payment must fail because the plan has been substantially consummated and no meaningful relief is available at this late date. In other words, the Eleventh Circuit held the issue is now moot. App. A at 6-7a. The Eleventh Circuit also held that the government's claim is not an administrative first priority claim as defined by the plan. App. A at 8-9a. And of course, the opinion also held that the Liquidating Trustee is not a trustee under Title 11, and therefore has no tax obligations under the Internal Revenue Code, App. A at 10-12a.

The Eleventh Circuit's conclusion that the doctrine of mootness precluded the relief sought was central to its opinion. App. A at 6-7a. That court affirmed the bankruptcy

court's holding that to require the trust to file tax returns and pay the Debtors' federal income taxes:

> would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

App. C at 36-37a.

The Eleventh Circuit denied the Debtors' suggestion of rehearing *in banc* without a single member of the court voting for rehearing, including the judge who dissented from the panel decision. App. E at 41a. The government did not seek rehearing. The Eleventh Circuit and this Court denied the Debtors' motions to stay the mandate. Liquidating Trustee's App. D at 12a and E at 15a. In addition to not seeking rehearing, the government chose not to seek a stay of the mandate after the Eleventh Circuit's decision was rendered.

SUMMARY OF ARGUMENT

The Petitions for Writs of Certiorari should be denied because there is no legally cognizable basis for granting the writ. The Debtors and the government have attempted to create conflicts in the law where none exist. In addition, the claim that this case presents an important question of federal law concerning the obligation of the Liquidating Trustee to file tax returns and pay income taxes ignores repeated findings that the government is the victim of its own inaction. This case is not precedent for the use of a liquidating trust to avoid tax. All that is necessary to avoid such a result is that the government, the Debtor or any interested party raise the issue of tax responsibility in a timely fashion. Once a plan has been confirmed and is substantially consummated, it is too

late to modify it to require such payment. For all of these reasons, the Petitions for Writs of Certiorari should be denied.

ARGUMENT

I.

REASONS WHY THE COURT SHOULD DENY THE WRIT

The Petitioners have not met any of the recognized standards governing review by certiorari as set forth in Supreme Court Rule 10. These considerations, "while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered." Sup.Ct.R. 10.1. As there is neither a conflict between the Eleventh Circuit's decision and decisions of this Court or other Courts of Appeals, nor an important question of federal law which has not been, but should be settled by this Court, the Petitioners have failed to demonstrate any of the established criteria and the petitions should be denied. *See* Sup.Ct.R. 10.1(a)-(c).

A.

There Is No Conflict In The Law

The Petitioners' attempt to establish that the Eleventh Circuit's opinion conflicts with decisions of this Court fails, for the cases cited as evidence of the alleged conflict are wholly inapplicable.

As their first reason why the writ should be granted, the Petitioner-Debtors cite *Nicholas v. United States*, 384 U.S. 678, 692-94 (1966) for the proposition that a trustee appointed by a bankruptcy court to liquidate a corporation is subject to penalties imposed by the Internal Revenue Service for failure to file tax returns. (Petition for Writ of Certiorari at 10). *Nicholas*, however, involved a bankruptcy trustee rather than a contract trustee appointed under a confirmed plan, and there was never an issue of his obligation to pay the taxes in question. *Nicholas*, 384 U.S. at 681, n.7. The question in that case was limited to the government's entitlement to post-petition interest on an acknowledged tax liability. This case involves a substantially consummated plan of reorganization

which created a liquidating trust and which does not provide for payment of taxes. Thus, *Nicholas* fails to demonstrate the existence of a conflict that would warrant granting the writ.

Equally unfounded is the Petitioners' reliance on *California State Board of Equalization v. Sierra Summit, Inc.*, ___ U.S. ___, 109 S.Ct. 2228, 2235 (1989) as a basis for conflict jurisdiction. The Debtor-Petitioners acknowledge that *Sierra Summit* applies 28 U.S.C. Section 960 to *bankruptcy trustees* (Debtors' Petition for Writ of Certiorari at 10), yet they have consistently asserted throughout the scores of appeals in these bankruptcy proceedings, including in their petition in this Court, that Respondent Smith is not a bankruptcy trustee appointed in accordance with Bankruptcy Code Section 1104. The Eleventh Circuit did not hold that Section 960 does not require bankruptcy trustees to file tax returns; the opinion simply determines that this Liquidating Trustee does not have to file a tax return on behalf of the Debtors because, *inter alia*, he is not a bankruptcy trustee. The Liquidating Trust is not subject to 28 U.S.C. Section 960.

In addition, Section 960 imposes a tax liability only where the officer or agent has been "conducting any business" of the debtor. Three courts have already determined that the Liquidating Trustee performed essentially ministerial functions and has not conducted any business of the Debtors. App. A at 3a n.2, 11-12a; B at 24a; C at 30a, 32-33a. A challenge to this finding is particularly inappropriate for certiorari review because it is essentially a disputed evidentiary matter already determined adversely to the Petitioners through three separate levels of review. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982); *Graver Tank & Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). Accordingly, neither 28 U.S.C. Section 960 nor *Sierra Summit* should serve as a basis for granting the writ of certiorari.

The Petitioner-Debtors next rely on 31 U.S.C. Section 3713 and *United States v. Key*, 397 U.S. 322, 324 (1970) as a basis for certiorari review, arguing that Section 3713 gives a priority to the government's purported tax claim. A close reading of the statute and *Key* reveals nothing that grants the government a first priority administrative tax claim under the circumstances of this case.

First, Section 3713(a)(2) is inapplicable because it provides that "[t]his subsection does not apply to a case under

Title 11." Second, *Key* involved the government's appeal of an order confirming a reorganization plan which provided for immediate payment of only part of the government's recognized tax claim, with the remainder to be paid over time. *Key*, 397 U.S. at 323. The issue before the Court in *Key* was whether the treatment of the government's tax claim under the plan was fair and equitable. In the case at bar, the plan made no provision for payment of the taxes in question. The plan was confirmed after notice to the government and without the government's objection or appeal. Now that the plan has been substantially carried out without payment of the taxes in question, it is simply too late to determine whether the plan should have included a provision for payment of the claimed taxes.

The Debtor-Petitioners also rely on *King v. United States*, 379 U.S. 329, 336-38 (1964) for the proposition that a disbursing agent is liable for payment of a government priority claim despite the failure of the plan to provide for its payment and despite the fact that "he performed 'only the ministerial function of paying out the deposited funds in conformity with the court's orders.' 379 U.S. at 338." (Petition for Writ of Certiorari at 11). The Petitioner-Debtors and the government further challenge the Eleventh Circuit's decision on the ground that Respondent Smith's powers exceed those of a mere disbursing agent, thus making him liable for the taxes.

King is hardly precedent under the facts of this case. Although the *King* plan did not provide for the government's contract claim, the debtor and the disbursing agent misrepresented to the bankruptcy court that even if it had to pay that claim, there would be enough money to do so. *King*, 379 U.S. at 331-32. Despite the government's timely claim, the disbursing agent paid other claims, leaving nothing with which to pay the government's claim. *King*, 379 U.S. at 332-33. The issue in *King* was whether the disbursing agent incurred personal liability for the government's contractual claim under these facts. *King*, 379 U.S. at 333. The answer was yes because he actively misled the court and the government. No claim of misrepresentation exists here.

King has a number of other substantial distinguishing facts. In that case, the government protected its interest by timely filing a claim. In this case, the government neither filed a claim of any kind nor brought a proceeding to enforce

its right to payment of the taxes in question. The Liquidating Trustee did not even exist at the time the plan was approved and certainly made no misrepresentations to the court concerning the availability of funds to pay the taxes, and there was no evidence that the Liquidating Trustee committed any impropriety in depleting trust assets in order to avoid payment to the government. In addition, in the instant case, neither the Debtors nor the government filed a counterclaim in the original adversary proceeding to hold Respondent Smith personally liable for the failure of the bank's disclosure statements to disclose the tax liability, or the failure of the plan to provide for payment of the taxes. Unlike the disbursing agent in *King*, Respondent Smith has no relationship with the Debtors or with the proponent of the plan except that of an independent trustee. The disbursing agent in *King* knew of the government's claim and took steps to evade it. It was the Debtor-Petitioners in this case who knew of a potential tax liability and ignored the bankruptcy court's suggestion to present evidence of the amount of the alleged taxes and to move to modify the plan prior to substantial consummation. Liquidating Trustee's App. F at 17-18a. *King* is entirely inapplicable to this case and cannot serve as grounds for conflict jurisdiction.

Under facts similar to the case at bar, a bankruptcy court in Illinois rejected a claim of liability under *King*. In *In re Childress*, 59 Bankr. 828 (Bankr. N.D. Ill. 1986), the debtor brought an adversary proceeding against a disbursing agent for breach of fiduciary duty for failure to pay federal income taxes on the gain earned from the post-confirmation sale of the debtor's realty. That plan provided for the payment of such taxes, but did not include the estimated tax liabilities in the disbursement portion of the plan. 59 Bankr. at 829 and 831. The disbursement agent made a 100% distribution to creditors following the sale of the debtor's realty pursuant to court order, but the order did not require the retention of any funds to pay the taxes. 59 Bankr. at 829. The debtor waited several years before seeking relief. The bankruptcy court held that the debtor's failure to seek relief promptly was a bar to recovery. 59 Bankr. at 830 The court also held that the post confirmation sale of the debtor's real property did not give the government a fourth priority tax claim under former Bankruptcy Act Section 64a(4) because the taxes were not

due and owing prior to bankruptcy, nor did the sale give the government an administrative claim as defined by the plan. 59 Bankr. at 830-31.

The *Childress* court noted that even if the government was a creditor under the plan, it could not participate in the distribution because it failed to file a timely proof of claim, its claim was not "allowed" by the court, and the claim was not scheduled by the debtor. 59 Bankr. at 831. The court held there was no liability under this Court's decision in *King* or under 31 U.S.C. Section 3713 because "there was no debt due the United States in the form of a priority claim at the time of the February, 1981 order of disbursement," and because the duty to inform the court of the tax problem "was more properly on the debtor or his attorney." 59 Bankr. at 831-32. *Childress* further held:

> As the concurring opinion notes in *King*, a disbursing agent's control and possession are limited to the deposit. The deposit made by the debtor is merely required to include a sufficient sum to pay all scheduled priority claims. If the deposit does not include an amount sufficient to take care of all scheduled priority claims, the arrangement may not be confirmed. 8 Collier on Bankruptcy paragraph 5.32[8] at 663 (14th ed. 1974). If an arrangement is nevertheless confirmed without a sufficient deposit to pay all scheduled priority claims, the disbursing agent should arguably not be required to bear the burden of the court's unauthorized act absent facts such as in *King*. *See King v. United States, supra*, 85 S.Ct. at 434.
>
> Under the Bankruptcy Act, a disbursing agent is charged with distribution to specified recipients and has no reason or duty to know of or ascertain unscheduled debts. The disbursing agent performs only the ministerial function of paying out the deposited funds in conformity with orders of court. 8 Collier on Bankruptcy paragraph 5.27[7] at 640 (14th ed. 1974). Thus, lacking knowledge from some other source, the disbursing agent would be beyond the reach of 31 U.S.C. Section 192 if the government "priority claim" is unscheduled and unpaid. *King v. United States, supra*, at 433. The present case is simply not one of a disbursing agent's payment out the deposit so as to defeat a scheduled government priority claim.

Childress, 59 Bankr. at 832.

In re I.J. Knight Realty Corp., 501 F.2d 62 (3d Cir. 1974), also relied on by the Petitioners, is clearly inapposite. The Petitioners each rely on *Knight* for the proposition that the Liquidating Trustee is responsible for the tax claim because he is a trustee under Title 11, pursuant to Internal Revenue Code Section 6012(b)(3). *Knight*, unlike the case at bar, involved a bankruptcy trustee appointed pursuant to 11 U.S.C. Section 1104. On its face, Section 6012(b)(3) applies to bankruptcy trustees. Each reviewing court has found, however, that Section 6012(b)(3) is inapplicable in this case because the Liquidating Trustee is not a bankruptcy trustee appointed under Title 11, but rather a contract trustee with essentially ministerial duties. Because *Knight* only applies to bankruptcy trustees, it does not stand as a basis for conflict jurisdiction.

The Petitioners further rely on *In re Bentley*, 916 F.2d 431 (8th Cir. 1990) for the view that the Eleventh Circuit's decision conflicts with the fresh start provision of bankruptcy law. This position is unfounded. *Bentley* involved a Chapter 7 bankruptcy trustee's attempt to evade federal income taxes on the liquidation sale of estate property by "abandoning" the property pursuant to Section 554 of the Bankruptcy Code. *Bentley*, 916 F.2d at 432. *Id.* Although the trustee had filed tax returns, he disclaimed any tax liability. *Id.*

Unlike this case, *Bentley* involved a Chapter 7 bankruptcy liquidation sale rather than a sale pursuant to a confirmed Chapter 11 plan which bound the parties. Moreover, the trustee in *Bentley* tried to avoid his tax obligation by abandoning the sale proceeds pursuant to 11 U.S.C. Section 554. Abandonment is not an issue here. The *Bentley* court only held the sale was a taxable event under those circumstances. 916 F.2d at 433. It is true the court opined in reaching its conclusion that, "We note that a contrary holding would have the effect of burdening the debtor's fresh start under bankruptcy law," *Id.*, but that logic hardly warrants

granting a writ in this case. Unlike that case, the substantially consummated plan herein did not provide for such taxes. The Debtors knew it but did not seek modification and the government knew it and also did nothing. The Debtors had the opportunity to raise this issue in their unsuccessful appeal of the confirmation order. The issue is thus moot.

For all of the foregoing reasons, the Petitioners have entirely failed to establish the existence of a conflict between the opinion below and any decision of this Court, or of decisions of other courts of appeal.

B.

There Is No Important Question Of Federal Law

The government argues that the Eleventh Circuit's decision creates a "loophole of troubling proportions" because it allows trustees to avoid tax responsibilities and will encourage efforts by others to do so. The Eleventh Circuit created no such "loophole". The decision in question determined the plan did not provide for payment of income taxes, and because the government did not object to or appeal the confirmation order and allowed the plan to become substantially consummated, the relief sought by the government is now moot. App. A at 6-7a. Regardless of the applicability of any particular section of the Internal Revenue Code to the Liquidating Trustee, it is clear that the government is the architect of its own dilemma. There is no reason to believe that if a proper claim is promptly asserted, or the issue is otherwise timely presented to a reorganization court, there will be no bar to the collection of taxes. All the government need do is properly assert its rights.

C.

The Eleventh Circuit's Decision Is Consistent With Existing Law

The Petitioners have overlooked more than half of the Eleventh Circuit's decision. That court did not, as the Petitioner-Debtors assert, do "violence" to the Internal Revenue Code, nor did it ignore well established bankruptcy law. In

fact, the court's opinion is consistent with the law enunciated by this Court and by courts of appeals.

1. The Relief Sought Is Moot

The Eleventh Circuit's application of the mootness doctrine is consistent with federal law. The doctrine "is premised upon considerations of finality . . . and the court's inability to rescind . . . and grant relief on appeal." *Miami Center*, 838 F.2d at 1558, *quoting In re Sewanee Land Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). A court may dismiss an appeal based on its lack of power to rescind certain transactions. *See Markstein v. Massey Associates Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Roberts Farms, Inc.*, 652 F.2d 798 (9th Cir. 1981); *Miami Center*, 838 F.2d at 1547. At the time of the decision in question, this Court had already refused to consider the Debtors' various post-confirmation challenges to the application of the mootness doctrine to the substantially consummated plan of reorganization.[9] This Court should refuse to consider this latest challenge, as well.

In addition, because the relief sought by the Petitioners would amount to a post-confirmation, post-substantial consummation modification of the plan, no change should be permitted. It would conflict with well established bankruptcy law forbidding such action. *See* 11 U.S.C. Section 1127(b); *In re Seminole Park & Fairgrounds, Inc.*, 505 F.2d 1011, 1014 (5th Cir. 1974); *Claybrook Drilling Co. v. Divanco, Inc.*, 336 F.2d 697, 701 (10th Cir. 1964); *In re Northampton Corp.*, 59 Bankr. 963, 968-69 (E.D. Pa. 1984); *In re AT of Maine, Inc.*, 56 Bankr. 55, 57 (Bankr. Me. 1985); *In re Heatron*, 34 Bankr. 526 (Bankr. W.D. Mo. 1983).

The plan has already been substantially consummated and therefore cannot now be revised and modified. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d 46

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[9] *See* footnote 3.

(1988). In ruling in favor of the Liquidating Trustee in this case, the bankruptcy court held that "[i]t is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan." App. C at 36a. The government's failure to object when to have done so would have preserved the issue for review now precludes any attempt at further amendment. *See* 11 U.S.C. Section 1141(a); *In re St. Louis Freight Lines, Inc.*, 45 Bankr. 546, 552 (Bankr. E.D. Mich. 1984).

2. The Petitioners Are Estopped From Asserting A Tax Claim As An Administrative Or Other Expense Of The Miami Center Liquidating Trust

The Eleventh Circuit's decision is also consistent with the doctrine of estoppel, which precludes any attempt to hold the trust liable for the federal income taxes at issue. The plan has been substantially consummated for over five years. Silence on the question of whether such taxes were due under the plan meant that creditors and the bankruptcy court were led to believe the plan assets would be used to pay properly asserted and scheduled claims. Substantially all pre-petition creditors and most administrative creditors were paid years before the district court first imposed a stay at the Petitioners' request. Other claimants, such as attorneys, accountants and the Liquidating Trustee continue to perform services for the trust in reliance on the plan. The Petitioners offer no solution to resolve how monies validly paid to hundreds of creditors over five years ago can be recovered, or how payment to plan administrative creditors can be equitably resolved. The relief sought by the Petitioners is practically impossible, grossly unfair, and is precisely why the confirmed and substantially consummated plan cannot be dismantled. To require the Liquidating Trust to assume responsibility for payment of these taxes means that entirely innocent creditors who relied upon the disclosure statements and the plan of reorganization will be penalized because of the government's inaction. The Liquidating Trustee has simply carried out the plan as it is written. The Eleventh Circuit's decision recognized that the government is guilty of prejudicial delay in seeking relief and

the consequences of the unreasonableness of the relief now sought by the Petitioners.

In re International Horizons, Inc., 751 F.2d 1213 (11th Cir. 1985) is an excellent example of the application of this type of estoppel. In that case, the court held that estoppel precluded the Internal Revenue Service from asserting a post-confirmation claim for more than $20 million in corporate income taxes. Like the plan in this case, the plan in *International Horizons* scheduled and provided for payment of other federal tax claims, but did not provide for the income tax claim in question; and, just as in this case, the IRS neither filed an objection to the plan nor took any steps to put the parties on notice of the claim. During the confirmation hearing in *International Horizons*, an exchange occurred among the judge, the debtor and the IRS concerning the tax claims, but the government still did nothing to protect itself. In this case, an exchange regarding taxes occurred between the bankruptcy judge and the Debtors' attorney, but neither the Debtors nor the government did anything to resolve the issue. Just as in this case, the bankruptcy court in *International Horizons* confirmed the plan without objection from the IRS. When the IRS then attempted to assert the new tax claim, the Eleventh Circuit held that equitable considerations would not permit a post-confirmation amendment to allow payment of the previously unasserted IRS claim. 751 F.2d at 1217-19. The court's description of the government's conduct in *International Horizons* applies with equal force in this case:

> The Government had multiple opportunities to assert its claim timely; it did not. It had opportunity to object to the disclosure statement which did not schedule corporate income taxes; it did not. It was aware that the reorganization plan described payment only of *actual* tax liabilities and that the plan would be unviable should the government reach and prevail on the merits of its tax claim. Yet, it did not object to the plan either in writing or at the confirmation hearing. The bankruptcy court held that given the above behavior, the Service was estopped from asserting that a windfall would befall creditors absent the tax claims. We can find no abuse of

discretion in the court's equitable consideration of the Service's reorganization posture.

International Horizons, 751 F.2d at 1218-19.

The Eleventh Circuit's opinion is wholly consistent with the rule barring such late claims, and the government is estopped from now asserting the liability of the trust for the income taxes at issue.

3. The Tax Claim Does Not Have Priority

The Petitioners attempt to evade the mootness issue by arguing that the taxes are an administrative expense of the trust because the sale of the Washington properties occurred prior to confirmation, during the pendency of the Chapter 11 proceedings. This position is wrong.

By order of the bankruptcy court, the Debtors deposited the entire proceeds from the sale of the Washington properties into controlled bank accounts. No payment of taxes was made prior to confirmation and the plan expressly provided that all of the money in those accounts was available to the trust for payment of claims. It is now over six years since the sale and nearly six years after confirmation of the plan. No order was ever sought to determine whether the taxes in question are an administrative expense. The present claim for use of plan proceeds to pay income taxes as an administrative claim would simply rewrite the plan.

In a Chapter 11 proceeding, "administrative claims must ordinarily be paid no later than the effective date of a confirmed plan." 5 Collier on Bankruptcy 503.01. The alleged taxable event was described in the disclosure statement and in the plan, yet the government did nothing to notify anyone of its claims. It allowed everyone to act in reliance on the assumption there was no such claim.

The government is also not entitled to recover taxes on gain realized from the post-confirmation sale of the Miami Center as a first priority administrative expense because the plan's definition of an administrative claim does not include taxes and because a post-confirmation sale of realty is not an administrative expense of the bankruptcy estate entitled to

priority under the Bankruptcy Code. *See* 11 U.S.C. Sections 503 and 507.

The plan defines an "administrative claim" as the "actual, necessary expenses of preserving the consolidated estates of the debtors or operating their businesses, and allowances approved by the bankruptcy court." App. B at 21a. The alleged tax claim for gain on the sale of the Miami Center meets no part of this definition.

Further, the plan defines an "allowed claim" as one for which a proof of claim has been timely filed under the Bankruptcy Rules, or one which has been or is scheduled by the Debtors as liquidated and undisputed and to which no objection has been filed. *Id.* The alleged tax claim does not meet this definition either.

Bankruptcy Code Section 503(a) and Bankruptcy Rule 2016(a) require a claimant to file a request of payment of an administrative expense. *See In re Parker, Jr.*, 5 C.B.C.2d 913 (Bankr. E.D. Tenn. 1981), *aff'd*, 6 C.B.C.2d 1040 (E.D. Tenn. 1982) (the court requires a request for payment under Section 503(a)). No request has ever been made, hence the government's right to a claim is barred. The Eleventh Circuit's opinion is consistent with established law on this subject.

Even if the taxes were an "actual necessary expense" of preserving the Debtors' estates or operating the Debtors' businesses (which the Liquidating Trustee does not concede), the taxes are not an "allowed claim." The government was obligated to file a request for payment, set it for hearing and obtain a court order authorizing payment. As the government did none of these things, it is plain fairness and common sense that five and one-half years after confirmation, no change requiring payment of previously unasserted claims should be permitted. Certiorari should not be granted to review such a fact intensive question, particularly where three courts intimately familiar with this bankruptcy proceeding have found no merit in any of the Petitioners' arguments.

The Petitioners' reliance on 31 U.S.C. Section 3713 to establish priority is equally without merit. At trial, the government stated it was relying solely on Internal Revenue Code Sections 6012(b)(3) and (b)(4) as authority for its claim for

taxes. It took no discovery, introduced no testimony, and put on no evidence. At trial and in its post-trial memorandum, the government limited its argument to the effect of Section 6012(b). It was only in the appeal to the district court that the government asserted for the first time an administrative tax claim under 31 U.S.C. Section 3713. It was clearly improper to argue this statute for the first time on appeal. (Government's Petition for Writ of Certiorari at 14, no.11). *See Smith v. Horner*, 839 F.2d 1530, 1534 (11th Cir. 1988); *Capps v. Humble Oil and Refining Co.*, 536 F.2d 80 (5th Cir. 1976). In any event, Section 3713(a)(2) unequivocally provides: "[t]his subsection does *not* apply to a case under Title 11." (emphasis supplied). While the Liquidating Trustee is not a trustee under Title 11, as defined by any section of the Bankruptcy Code, the Debtors nonetheless filed Chapter 11 petitions under Title 11, and the plan was proposed as part of a Chapter 11 proceeding under Title 11, rendering Section 3713 inapplicable.

Assuming *arguendo* that the government does have a claim against the trust,[10] the tax claim would have a priority lower than that accorded to payment of pre-petition creditors and plan administrative expenses and, for reasons not applicable to whether the petitions should be granted, the bank would be responsible for the taxes. Liquidating Trustee's App. A at 5-6a.

In *United States v. Redmond*, 36 Bankr. 932 (D. Kan. 1984), the court held that taxes incurred post-confirmation were not an administrative claim against a post-confirmation trust. 36 Bankr. at 933. *Redmond* rejected the government's argument that it held an administrative claim:

> The government contends that the 'estate' continues to exist from the commencement of the case, throughout the administering of the estate and until the closing of the case. Taxes incurred by the reorganized debtor, it is argued, should be entitled to

[10] The lower courts never reached the issue of priority because of their uniform determination that the trust is not responsible for such tax reporting or payment.

> treatment as administrative expenses. Under the facts of this case, the government's argument is not persuasive to the Court. It is clear that upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases. As such, the tax liability of the reorganized debtor was not incurred in administering the bankruptcy estate. As a post-confirmation creditor, the IRS is not without remedies in dealing with the reorganized debtor.

36 Bankr. at 934.

The government in this case is not entitled to claim taxes on income earned by the post-confirmation sale of the Miami Center as an administrative expense of the trust because by definition, the plan does not provide for it. The plan is binding on the IRS, the Debtors, and every other creditor, even though it may "ultimately provide it [the government] with less than that to which it is otherwise entitled." *St. Louis Freight Lines*, 45 Bankr. at 552. This rule has been applied against both the IRS and other taxing authorities. *See, e.g., International Horizons, supra; In re Hebert*, 61 Bankr. 44, 47 (Bankr. W.D. La. 1986); *In re Sapienza*, 27 Bankr. 526 (Bankr. W.D. N.Y. 1983); *Western Thrift and Loan Ass'n v. Blair*, 21 Bankr. 316 (Bankr. S.D. Ca. 1982); *see also In re Todd* No. 1-8400998, slip. op. (Bankr. N.D. Ca. June 2, 1989) (government bound to Chapter 13 plan otherwise flawed by its failure to provide for taxes owed on transfer of realty pursuant to plan, where government failed to object to the plan). "Absent affirmative action at or prior to the confirmation hearing, the Internal Revenue Service, like any other creditor, has effectively waived any right to object to its treatment under the plan." *In re Hebert*, 61 Bankr. at 47. To grant the government a priority claim would be a windfall at the expense of the Debtors' legitimate creditors.

4. The Trust Is Not Responsible For The Debtors' Income Taxes Under The Internal Revenue Code.

The determination that the Miami Center Liquidating Trust is not responsible for taxes is consistent with the treatment provided by the Internal Revenue Code. Section 6012(b) of the Code, and those cases interpreting it, establish that the Miami Center Liquidating Trust is not a taxable entity.

In their attempt to broaden the scope of Internal Revenue Code Sections 6012(b)(3) and (b)(4) to apply to the Liquidating Trust, the Petitioner-Debtors claim that the Eleventh Circuit's decision does "violence" to the statutory scheme, while the government says it is a "distortion" of the Bankruptcy Code. In fact, the only damage to the statutory scheme is that perpetrated by the Petitioners in attempting to extend the law to the Liquidating Trustee. Tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corp. v. United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reason for this view is the maxim that the power to tax is the power to destroy, and "Congress could have manifested any other intent by a limiting or qualifying provision." *Frankel v. United States*, 192 F.2d 666 (8th Cir.), *cert. denied*, 371 U.S. 903 (1962). As Section 6012(b) does not expressly apply to the Liquidating Trustee, its applicability cannot be broadened to do so absent congressional amendment.

a. The trust is a grantor trust

The trust is a grantor trust as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. Sections 671-79. Therefore, the trust has no responsibility to pay the Debtors' federal income taxes. The Debtors, as the beneficial owners of the trust, are taxed separately. *See United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985); *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985).

Sonner further demonstrates that the Eleventh Circuit's opinion below is consistent with tax and bankruptcy laws. The

Sonner court held that a post-confirmation trust identical to the Miami Center Liquidating Trust was a grantor trust and was not a taxable entity. 53 Bankr. at 866. In *Sonner*, the debtor's voluntary Chapter 11 resulted in a confirmed plan which required the debtor to convey his interest in realty to a creditors' trust, which in turn required the liquidation of realty at specified prices for the benefit of the debtor's creditors. That is precisely what the confirmed plan in the instant case provides. And like the plan *sub judice*, the *Sonner* trust did not provide for the payment of taxes on any gain realized from the sale of the debtor's real estate. The issue in that case was "whether the [post-confirmation] Creditors' Trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 Bankr. at 860. The Court held the answer was no.

Relying on Internal Revenue Code Section 6012(b) and 28 U.S.C. Section 960, the *Sonner* court held the trust was not responsible for the payment of any capital gains tax resulting from the sale of trust property because the trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as the ultimate owner of the trust, was liable for the taxes. *Sonner*, 53 Bankr. at 866.

The term "trust" referred to in Section 6012(b)(4) does not apply to the Liquidating Trust herein, both because it is not a Chapter 7 or Chapter 11 estate, and because Section 6012(b)(4), read *in pari materia* with 26 U.S.C. Sections 671-79 and Revenue Regulation Sections 1.677(a)-1(d), 1.672(b)-1, 1.672(a)-1(a) and 1.672(a)-1(b), makes it clear that the statute's use of the term "trust" *excludes* grantor trusts. Thus, Section 6012(b)(4) is not applicable to the Miami Center Liquidating Trust.

Stockton v. United States, 335 F.Supp. 984, 986 (C.D. Cal. 1971) also supports this conclusion. In *Stockton*, the plaintiff and his corporations transferred all of their assets to a third party who was required to liquidate the assets and distribute the proceeds to creditors in order to discharge corporate obligation which the debtor had guaranteed. The *Stockton* court found this arrangement to be a trust and held that because the purpose of the trust was to pay the grantor's

indebtedness, the debtor was treated as the owner of the trust for income tax purposes, and the trust was not a taxable entity.

Although the trust in *Stockton* did not arise out of a bankruptcy proceeding, the similarities to the Miami Center Liquidating Trust and the *Sonner* trust cannot be overlooked. The *Stockton* trust, the *Sonner* trust, and the Miami Center Liquidating Trust are all instruments created for the sole purpose of liquidating assets owned by debtors to pay their creditors, and in doing so, to discharge the debtors from their legal obligations. The *Sonner* court concluded:

> Based on this Court's consideration of both the grantor trust provisions of the Internal Revenue Code and the *Stockton* opinion, this Court is unable to limit *Stockton* to a non-bankruptcy situation. Whether Sonner is discharged in bankruptcy has no effect on the provisions of the plan which without modification in this Court must be carried out. Furthermore, Sonner's discharge is irrelevant as to the effect the Internal Revenue Code, has with respect to the tax attributes of the plan. As a result, there seems little doubt but that the trust is a grantor trust as defined in Subchapter J of the Internal Revenue Code.

53 Bankr. at 865.

b. The Liquidating Trustee is a contract trustee.

The Petitioners' argument that Sections 6012(b)(3) and (b)(4) apply to the Liquidating Trustee fails because the Liquidating Trustee is not a trustee in a case under Title 11, a receiver, or an assignee. The Eleventh Circuit's affirmance of the lower courts' finding that the trustee's duties are more analogous to those of a disbursing agent is not an appropriate subject for review in this Court because it is a fact determination already approved by the trial court and affirmed through two levels of appellate review. *See Rogers*, 458 U.S. at 624; *Graver*, 336 U.S. at 275.

Section 6012(b) has no application to the Liquidating Trustee because he was named under a plan confirmed in a

bankruptcy proceeding which became effective *after* confirmation. Thus, he never served as a Title 11 bankruptcy trustee. His appointment, his responsibilities and his authority all arise by reason of the contract which established the Miami Center Liquidating Trust. The Debtors have repeatedly asserted that the Liquidating Trustee is not a bankruptcy trustee in a long line of appeals to this and other courts. Because he is not, those cases cited as proof of the applicability of Sections 6012(b)(3) and (b)(4) are not on point. None involved a trustee appointed to administer a liquidating trust arising upon confirmation of a plan. *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974), *In re Mid America Co.*, 31 F.Supp. 601 (S.D. Ill. 1939), *Louisville Property Co. v. Commissioner*, 140 F.2d 547 (6th Cir. 1944), *cert. denied*, 322 U.S. 755 (1944), and the other cases relied on by the Petitioners' (Debtors' Petition for Writ of Certiorari at 24, n. 29, 25, n. 31 and Government's Petitions for Writs of Certiorari at 9-15), do not conflict with the Eleventh Circuit's opinion below.

The evidence at trial established that the Liquidating Trustee is only a contract trustee. As the district court properly concluded: "Because of the limited and essentially ministerial functions assigned to the Liquidating Trustee by the Amended Plan, *see* Amended Plan, Art. V at 43, the Liquidating Trustee is a contract trustee, rather than a 'trustee in a case under title 11;' further, the Liquidating Trustee's non-discretionary duties to identify and pay allowed claims in accordance with the terms of the Amended Plan are more akin to those of a disbursing agent, rather than an assignee or fiduciary. *See In re Alan Wood Steel Co.*, 7 Bankr. 697 (Bankr. E.D. Pa. 1980)." App. B at 24a. The Eleventh Circuit concurred: "If Congress had intended that all trustees be subjected to the provisions of section 6012, it would have so provided. We also conclude that section 6012 was not intended to apply to a broad range of individuals without regard to the functions which they perform." App. A at 11a.

The gist of the Petitioners' contention is that because the Liquidating Trustee's duties are similar to those of a bankruptcy trustee, perforce he is a trustee under Title 11 and is

subject to Section 6012(b). That is neither true nor logical. The uncontroverted fact is that the Liquidating Trustee was *not* appointed as a Title 11 trustee of a Chapter 11 estate in accordance with the Bankruptcy Code and the Bankruptcy Rules. His powers are not coextensive with those of a trustee in a case under Title 11. He does not have the strong arm authority given trustees under Section 544 of the Bankruptcy Code, nor does he have the power to avoid preferential and fraudulent transfers under Bankruptcy Code Sections 547 and 548. His powers are fixed entirely by contract and not by the Code. He is to pay creditors in accordance with a plan he had no hand in creating. He is not even compensated in the same manner as a Title 11 trustee. It would be entirely inappropriate to grant certiorari to review such a factual determination.

The Petitioners have also argued that the Liquidating Trustee is nonetheless a "trustee under title 11" because the Debtors sought protection in the bankruptcy court under Title 11 and because the bankruptcy court confirmed the plan of reorganization pursuant to Chapter 11. That does not make the Liquidating Trustee a trustee under Title 11, however. Simply because the plan was confirmed in a Chapter 11 proceeding under Title 11 does not confer the status of "bankruptcy trustee" on the Liquidating Trustee. He is an entirely different creature having different powers and responsibilities. The government argues that because no case has ever used the term "contract trustee," the term cannot legally exist. Whether that term has been used before is irrelevant. The status of the Liquidating Trustee is determined by the confirmed plan. Respondent Smith was appointed pursuant to a plan that is no longer subject to challenge.[11] Whatever term one uses to describe the Liquidating Trustee, it is plain that he is not a trustee, assignee or fiduciary as defined by Internal Revenue Code Section 6012(b). The Petitioners' attempt to extend the applicability of Section 6012(b) should fail.

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[11] In addition to not appealing the confirmation order, the government never appealed the August 12, 1985 order appointing Smith as Trustee of the Miami Center Liquidating Trust.

Both the Debtors and the government conceded at the outset of the trial in the bankruptcy court that the trust is not a separate taxable entity. If it is not such an entity, it has no duty to file a tax return and, under 26 U.S.C. Section 6151, it has no duty to pay any tax.

Despite the legal gymnastics used in an attempt to mold the tax laws to apply to the Liquidating Trustee, the Petitioners have not explained why the Eleventh Circuit's reliance on *Alan Wood Steel* conflicts with established law. The court in *Alan Wood Steel* held that 26 U.S.C. Section 6012(b)(3), the only Internal Revenue Code provision which deals with persons required to file tax returns in the bankruptcy context, does not apply to a disbursing agent because he is not a receiver, a trustee in bankruptcy, or an assignee of the debtor corporation. 7 Bankr. at 700. Clearly then, not every entity serving to carry out the terms of a confirmed plan is liable to file tax returns and pay taxes on gain realized from the sale of a debtor's property. Like the disbursing agent in *Alan Wood Steel*, the Liquidating Trustee has the duty to identify plan assets and to collect and distribute those assets for distribution to allowed creditors, as provided for in the plan. He has no discretion beyond his authority to use the assets of the trust for payment of its allowed claims. He never operated the Debtors' business and he never exercised any authority other than as provided in the plan.

Not only is the Liquidating Trustee not a bankruptcy trustee, he is not an assignee under Section 6012(b). "[A] disbursing agent is not an assignee of the corporation since there is no assignment to him of property of the debtor corporation." *In re Alan Wood Steel Co.*, 7 Bankr. at 700, citing Black's Law Dictionary 109 (5th ed. 1979). In the instant case, there was no assignment. The Liquidating Trustee holds trust property pursuant to a confirmed plan by court order, and he only holds this property on an interim basis until it can be paid over to plan creditors. The plan provides that any property remaining after all allowed creditors are paid is returned to the Debtors.

Additionally, if Congress had intended to require the filing of a tax return by a contract trustee whose sole responsibility is to pay the Debtors' legal obligations, it could have explicitly provided for this in Section 6012(b) or elsewhere in the Internal Revenue Code. It is evident that liquidating trusts are not new creations about which Congress knew nothing and for which Congress could not provide. The Bankruptcy Code itself contemplates the creation of such a trust to carry out the terms of a plan of reorganization. *See* 11 U.S.C. Section 1142(a). Use of liquidating trustees and agents, appointed pursuant to a plan of reorganization, has been approved in a number of cases and is consistent with the Bankruptcy Code. *See, e.g.*, 11 U.S.C. Section 1123; *In re Jorgenson*, 66 Bankr. 104 (9th Cir. B.A.P. 1986).

There is, therefore, no authority to extend Section 60[illegible] or any other provision of the Internal Revenue Code to [illegible]uidating Trust in these proceedings. The Eleventh C[illegible] decision is consistent with federal law and should be upheld.

CONCLUSION

For all of the reasons set forth herein, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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Nos. 90-1361, 90-1484

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN RE HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP AND CHOPIN ASSOCIATES,

Debtors.

HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, and CHOPIN ASSOCIATES, and THE UNITED STATES OF AMERICA,

Petitioners,

vs.

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and THE BANK OF NEW YORK,

Respondents.

APPENDIX TO THE BRIEF OF FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI FILED BY THE DEBTORS AND THE UNITED STATES OF AMERICA

APPENDIX

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST

Plaintiff

vs.

THE UNITED STATES OF AMERICA, THE BANK OF NEW YORK, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, HOLYWELL CORPORATION, AND THEODORE B. GOULD

Defendants

CASE NO: 84-01590/ 91/92/93/94 BKC SMW

ADVERSARY NO. 87-0627 -BKC-SMW-A

ADVERSARY COMPLAINT FOR DECLARATORY RELIEF

1. This is an adversary proceeding for a declaratory judgment. The court has jurisdiction over the parties and the subject matter, pursuant to 28 U.S.C. Sections 157 and 1334 (a), and Bankruptcy Rule of Procedure 7001 (a).

2. The Internal Revenue Service is an agency of the United States of America.

3. The Bank of New York is a New York Banking Corporation. Miami Center Limited Partnership (MCLP); Miami Center Corporation (MCC); Chopin Associates (Chopin); Holywell Corporation (Holywell); and Theodore B. Gould (Gould) are each debtors (hereinafter debtors) in proceedings pending before this court under case numbers 84-01590/91/92/93/94. The bankruptcy cases have been substantively consolidated.

4. The Bank of New York proposed an Amended Plan of Reorganization for the debtors. The Plan was confirmed by this Court and, as modified on remand, was affirmed by the District Court. The Eleventh Circuit Court of Appeals thereafter dismissed the appeal on the ground the Plan had been substantially consummated, and hence no effective relief could be granted. The matter pends in the Eleventh Circuit on rehearing.

5. As confirmed, the Plan provides for the establishment of the Miami Center Liquidating Trust (the Trust) and the appointment of a Trustee for the purpose of determining the identity, amount and validity of claims. In addition, the Trustee was appointed to disburse the sums due as payment of claims under the Plan. The Plan required the Trustee to convey the Miami Center property (the Pavilion Hotel, the Edward Ball Office Building, the Podium and the parking garages) to the Bank of New York for $255,600,000, from which the Bank's lien would be satisfied. The Plan requires the debtors to fully cooperate in carrying out its terms.

6. This Court had previously ordered the Trustees to take control of proceeds from the sale of properties in

which Holywell, Gould and Twin Development Corporation (a wholly owned subsidiary of Holywell) had an interest, and to use these funds (the Washington Proceeds) for the payment of creditors, as provided in the Plan.

7. The Plan provides for discharge of the debtors, and, after the payment of all creditors and the entry of a final decree, for the dismissal of these proceedings.

8. The Plan was confirmed in August, 1985. The Trustee conveyed the Miami Center Property to the nominee of the Bank of New York on October 10, 1985.

9. No provision was made in either the Plan or the Order authorizing the Trust to use the Washington Proceeds for payment of income taxes on any gain realized by the debtors from the sale of the Washington and Miami Center properties.

10. In each interim report filed by the Trustee concerning the identification and payment of creditors and the establishment of reserves for disputed and unliquidated claims, there was no provision made for the payment of income taxes on any gain realized by the debtors from the sale of the Washington and Miami Center properties.

11. Holywell Corporation and subsidiaries' consolidated federal income tax return for the fiscal year ending July 31, 1984, has only just been filed. The debtors have advised the Trustee they are in the process of preparing the 1984-1985 (7/31/85) fiscal year return and should be ready to file the return shortly. This return will include the gain on the sale of the Washington properties. Income

taxes relating to this gain may be partially or totally offset by prior net operating loss carryforwards. The 1985-86 (7/31/86) fiscal year return has yet to be prepared. However, the debtors have recently informed the Trustee, the 7/31/86 return will reflect a significant tax liability (many millions of dollars) due to the sale of the Miami Center properties. The debtors have advised the Trustee they will not file the 7/31/86 return.

12. The Plan requires payment of creditors in strict priority, that is, each creditor of a senior class must be paid, or an adequate reserve established for payment of unliquidated or disputed claims before payment of any junior class may be made. No payment has been made nor has any reserve been established for the payment of income taxes which may be due on the gain realized from sale of the Washington and Miami Center properties. Many claims in Classes 1 through 6 have been paid, despite the failure to determine, pay or reserve for these income taxes.

13. The Trustee has determined that if the Trust is obliged by law to be responsible for the payment of these income taxes there will be insufficient funds remaining in the Trust for the payment of allowed or previously reserved claims, including administrative and post-confirmation fees and expenses.

14. If the Trust is obliged by law to pay these income taxes, to determine the income tax liability the Court must first order the debtors to promptly prepare and file the federal income tax returns for all applicable periods. If the tax is due and no other source of payment of claims is available from Trust assets, the Trustee may

be required to determine the source and amount of recoupment from sums previously paid to junior classes of creditors in order to properly pay claims in order of strict priority.

15. The Trustee believes that the Trust itself is not a separate entity for federal income tax purposes. Therefore, the interest income earned by the Trust has not been reported on an income tax return filed by the Trust. However, the Trustee has been informed that the debtors are including their share of the Trust's interest income on their own federal income tax returns.

16. The Trustee is uncertain as to his authority to pay existing allowed claims, orders determining administrative and post-confirmation fees, and costs until the determinations of tax liability has been made. The orderly administration of the Trust requires the Trustee to have the immediate ability to pay administrative claims including fees and costs to professionals needed to assist in the resolution of these issues.

17. The Bank of New York was the proponent of the Plan and the Disclosure Statement upon which confirmation was obtained. These documents were relied upon by creditors and the Court in obtaining the Order of Confirmation. It failed to include a provision for payment or reservation of the income taxes on the gain from sale of the Washington and Miami Center properties. The Bank of New York is also a creditor of the Trust, claiming a right of reimbursement for fees and costs superior to any income tax indebtedness of the Trust. The Trustee is uncertain as to the priority of payment of this and other

claims asserted by the debtors as being entitled to right of payment from the assets of the Trust.

18. The Trustee contends the Trust is not responsible to file the 1985-1986 tax return under applicable tax and bankruptcy law, and is not liable to pay any income tax due the IRS. If the trust is liable for such taxes, then in that event the Bank of New York should be held responsible for all such payment because it proposed the Plan without providing the means to pay such taxes; because it failed to disclose the obligation to pay such taxes in the disclosure statement upon which creditors and the Court relied; and because the Bank of New York agreed to indemnify and hold the Trustee harmless for any claims as a result of his execution of the deed of conveyance of the Miami Center property.

19. The Trustee is in need of immediate declaratory relief regarding the obligation to file tax returns and the payment of income tax liabilities. The Trustee requests the Court to order the debtors to:

a. Prepare and file a tax return reflecting any tax liability from the sale of the Washington properties.

b. Prepare and file a fiscal 1985-1986 tax return reflecting any tax liability from the sale of the Miami Center properties.

The Trustee requests the Court to determine the rights and obligations of the Trust to:

a. Pay income taxes due, if any, on the sale of the Washington property.

b. Pay income taxes due, if any, on the sale of Miami Center property.

c. Determine priority in right of payment of all remaining unpaid claims, including those asserted by the debtors.

d. Obtain liquidation of all remaining assets and interests in property owned by the consolidated debtors in the event the Trust is without sufficient assets to pay all allowed claims, fees and costs.

e. Seek recovery for any sums previously paid out of strict priority in the event the Trust is without sufficient assets to pay all claims entitled to priority of payments.

f. Determine the liability of the Bank of New York for any income taxes which may be due.

g. The Trust should be immediately authorized to pay orders allowing fees and accrued administrative and post confirmation fees, costs and expenses of professionals, including those fees, costs and expenses incurred in the resolution of these issues.

h. Determine the Trust's liability for income taxes on interest income earned by the Trust.

Respectfully submitted,

HERBERT STETTIN, P.A.
ONE S. E. THIRD AVENUE
#2215
MIAMI, FLORIDA, 33131
TELEPHONE 305-374-3353

BY: /s/ Herbert Stettin
Herbert Stettin

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

HOLYWELL CORPORATION, et al.,

Debtor.

_____/

CASE NO: 88-0795-CIV-KEHOE

(Filed JUN 20 1988)

THE UNITED STATES OF AMERICA, et al.,

Appellants,

v.

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust,

Appellees.

_____/

ORDER OF STAY

THIS MATTER arose before the Court upon the Appellants' emergency motion to stay the Final Judgment entered by the United States Bankruptcy Court on April 28, 1988, and the court's hearing thereon. After careful consideration, it is hereby

ORDERED AND ADJUDGED that the Appellants' Emergency Motion for Stay is GRANTED. *See Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

It is further

ORDERED AND ADJUDGED that the parties SHALL SUBMIT in writing an agreed accelerated briefing schedule within three (3) days of the date of this Order. If the

parties fail to do so, the Court will establish an accelerated briefing schedule.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of June, 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

copies furnished to: Theodore B. Gould, Vance E. Salter, Esq., Alvarez Lecesne, Jr., Esq., Herbert Stettin, Esq., Robert M. Musselman, Esq., S. Harvey Ziegler, Esq., Robert Mark, Esq., Frank DeLeon, Esq., Barbara E. Vicevich, Esq.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-5862

(Filed SEP. 8, 1989)

IN RE: HOLYWELL CORPORATION,

Debtor.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

SHUTTS & BOWEN,
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES,
THEODORE B. GOULD,

Plaintiffs,

versus

FRED STANTON SMITH, as Trustee of
the Miami Center Liquidating Trust
and BANK OF NEW YORK,

Defendant-Appellee.

IN RE: HOLYWELL CORPORATION,

Debtor.

HOLYWELL CORPORATION,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,

Plaintiffs-Appellees,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

On Appeal from the United States District Court
the Southern District of Florida

Before RONEY, Chief Judge, KRAVITCH and EDMONDSON, Circuit Judges.

BY THE COURT

The motion for stay pending appeal of the judgment and order in this case is GRANTED.

The previous order expediting the appeal remains in effect.

Appellant's motion for leave to file a response is moot.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5862

(Filed Jan. 17, 1991)

IN RE: HOLYWELL CORPORATION,

Debtor.

FRED STANTON SMITH,
as Trustee of the Miami Center Liquidating Trust,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,
HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,

Defendants-Appellants,

SHUTTS & BOWEN,

Intervenor-Appellee,

BANK OF NEW YORK,

Defendant-Appellee.

IN RE: HOLYWELL CORPORATION,

Debtor.

FRED STANTON SMITH,
as Trustee of the Miami Center Liquidating Trust,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant,

HOLYWELL CORPORATION,
MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
CHOPIN ASSOCIATES and
THEODORE B. GOULD,

Defendants-Appellants,

SHUTTS & BOWEN,

Intervenor-Appellee,

BANK OF NEW YORK,

Defendant-Appellee.

On Appeal from the United States
District Court for the
Southern District of Florida

ORDER:

(X) The motion of Appellants for (X) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellants for ( ) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including ___, ___ the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ John Hatchett
UNITED STATES
CIRCUIT JUDGE

APPENDIX E

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

January 22, 1991

Mr. Herbert Stettin
One S.E. Third Avenue, #2215
Miami, FL 33131

Re: Holywell Corporation, et al.,
v. Fred Stanton Smith, et al.,
Application No. A-546

Dear Mr. Stettin:

The application for a stay of mandate and to reinstate injunction pending timely filing and disposition of petition for writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on January 22, 1991 endorsed thereon the following:

"Denied
Jan. 22, 1991
Anthony M. Kennedy"

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By /s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE – FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Dennis G. Lyons
Arnold & Porter
1200 New Hampshire Ave., NW
Washington, DC 20036

Mr. Kenneth W. Starr
Solicitor General
U.S. Department of Justice
Washington, DC 20530

Mr. Vance E. Salter
Coll Davidson Carter, et al.
201 S. Biscayne Blvd., #3200
Miami, FL 33131

Mr. Herbert Stettin
One S.E. Third Avenue, #2215
Miami, FL 33131

Ms. Barbara E. Vicevich
Shutts & Bowen
201 S. Biscayne Blvd., #1500
Miami, FL 33131

APPENDIX F

* * *

[p.51] position but we think, so that we can get some focus here this afternoon, that we should defer argument on that matter.

We agree with the trustee's position that the trustee is not liable, that the debtors are liable to file returns and to pay the taxes, and we would reserve the right to argue the secondary issues only if it's necessary to argue them.

Also, Your Honor, we have filed a reasonably brief memorandum of law with the Court and we hope the Court will consider that.

THE COURT: First witness.

MR. STETTIN: You've heard it. I will simply disagree with a number of the items that Mr. Gould and Mr. Musselman have stated, but I think it's appropriate during the trial.

MR. GOULD: Can I read something to the Court before the trial begins?

THE COURT: Surely.

MR. GOULD: It's two things. This is a transcript, part of a transcript from July 18, 1985, Pages 98 and 99. This is the substantive consolidation hearing. This is Judge Britton speaking to the Bank of New York and to our counsel. I in fact was not there.

"THE COURT: The last point I want to touch [p. 52] on are the tax consequences. In this area, I readily

concede that I am a babe in the woods and haven't the foggiest notion of what the tax consequences would be on the particular decision. If a modification of this plan or any other adjustment can be made to eleviate adverse tax consequences for the debtors, then I think that a request for such a modification ought to be respected and honored, and I would so as long as I have the discretion to do so intend to accomplish that result.

"I think all of us have recognized in our discussion that there might be tax consequences. We are not certain if we have considered all that we could do to eleviate the adverse tax consequences."

As a tax expert, I will tell you there is only one way that can be done and that is by not selling Miami Center Limited Partnership's assets.

The Bankruptcy Court on January 29, 1986, adopted verbatim the findings of fact proposed by the Bank of New York. Page [sic] 40 and 41, it says:

> "There has been no evidence to substantiate the debtors' claims that substantive consolidation will somehow cost them [p. 53] approximately $17 million in Federal income taxes."

Now, when you read the bank's memorandum, I think you ought to read it in the light of, one, of their knowledge that there were adverse tax consequences. Presumeably [sic] they are sophistated [sic] businessmen, they know that a sale of assets results in tax liabilities.

Secondly, the findings of fact that they induced Judge Britton to adopt verbatim that there was no evidence of a tax liability.

Thank you.

MR. STETTIN: Would Your Honor care to take a short recess? You have been going since 1:00.

THE COURT: Five minutes, please.

(Whereupon, a short recess was had, after which the following proceedings in the foregoing hearing were had:)

THE COURT: First witness, please.

MR. STETTIN: Don Denkhous.

APPENDIX G

STATUTES

11 U.S.C. Section 503

§ 503. Allowance of administrative expenses

(a) An entity may file a request for payment of an administrative expense.

(b) After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502(f) of this title, including –

(1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

(B) any tax –

(i) incurred by the estate, except a tax of a kind specified in section 507(a)(7) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case; and

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by –

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title; or

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian;

(4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title; and

(6) the fees and mileage payable under chapter 119 of title 28.

11 U.S.C. Section 507

§ 507. Priorities

(a) The following expenses and claims have priority in the following order:

> **(1)** First, administrative expenses allowed under section 503(b) of this title, and any fees and charges assessed against the estate under chapter 123 of title 28.
>
> * * *
>
> **(7)** Seventh, allowed unsecured claims of governmental units, only to the extent that such claims are for –
>
> > **(A)** a tax on or measured by income or gross receipts –
> >
> > > **(i)** for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;
> >
> > > **(ii)** assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
> >
> > > **(iii)** other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;
> >
> > **(B)** a property tax assessed before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

> > **(C)** a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;
> >
> > * * *

11 U.S.C. Section 1127

§ 1127. Modification of plan

* * *

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

11 U.S.C. Section 1141

§ 1141. Effect of confirmation

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in, the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

* * *

11 U.S.C. Section 1142

§ 1142. Implementation of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

* * *

26 U.S.C. Section 671

§ 671. Trust income, deductions, and credits attributable to grantors and others as substantial owners

Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual. Any remaining portion of trust shall be subject to subparts A through D. No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart.

26 U.S.C. Section 672

§ 672. Definitions and rules

(a) Adverse party. – For purposes of this subpart, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.

(b) Nonadverse party. – For purposes of this subpart, the term "nonadverse party" means any person who is not an adverse party.

(c) Related or subordinate party. – For purposes of this subpart, the term "related or subordinate party" means any nonadverse party who is –

(1) the grantor's spouse if living with the grantor;

(2) any one of the following: The grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

For purposes of sections 674 and 675, a related or subordinate party shall be presumed to be subservient to the grantor in respect of the exercise or nonexercise of the powers conferred on him unless such party is shown not to be subservient by a preponderance of the evidence.

(d) Rule where power is subject to condition precedent. – A person shall be considered to have a power described in this subpart even though the exercise of the power is subject to a precedent giving of notice or takes effect only on the expiration of a certain period after the exercise of the power.

(e) Grantor treated as holding any power or interest of grantor's spouse. –

(1) In general. – For purposes of this subpart, a grantor shall be treated as holding any power or interest held by –

(A) any individual who was the spouse of the grantor at the time of the creation of such power or interest, or

(B) any individual who became the spouse of the grantor after the creation of such power or interest, but only with respect to periods after such individual became the spouse of the grantor.

(2) Marital status. – For purposes of paragraph (1)(A), an individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

26 U.S.C. Section 673

§ 673. Reversionary interests

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust in which he has a reversionary interest in either the corpus or the income therefrom, if, as of the inception of that portion of the

trust, the value of such interest exceeds 5 percent of the value of such portion.

(b) Reversionary interest taking effect at death of minor lineal descendant beneficiary. – In the case of any beneficiary who –

(1) is a lineal descendant of the grantor, and

(2) holds all of the present interests in any portion of a trust

the grantor shall not be treated under subsection (a) as the owner of such portion solely by reason of a reversionary interest in such portion which takes effect upon the death of such beneficiary before such beneficiary attains age 21.

(c) Special rule for determining value of reversionary interest. – For purposes of subsection (a), the value of the grantor's reversionary interest shall be determined by assuming the maximum exercise of discretion in favor of the grantor.

(d) Postponement of date specified for reacquisition. – Any postponement of the date specified for the reacquisition of possession or enjoyment of the reversionary interest shall be treated as a new transfer in trust commencing with the date on which the postponement is effective and terminating with the date prescribed by the postponement. However, income for any period shall not be included in the income of the grantor by reason of the preceding sentence if such income would not be so includible in the absence of such postponement.

26 U.S.C. Section 674

§ 674. Power to control beneficial enjoyment

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

(b) Exceptions for certain powers. – Subsection (a) shall not apply to the following powers regardless of by whom held:

(1) Power to apply income to support of a dependent. – A power described in section 677(b) to the extent that the grantor would not be subject to tax under that section.

(2) Power affecting beneficial enjoyment only after occurrence of event. – A power, the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event such that a grantor would not be treated as the owner under section 673 if the power were a reversionary interest; but the grantor may be treated as the owner after the occurrence of the event unless the power is relinquished.

(3) Power exercisable only by will. – A power exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

(4) Power to allocate among charitable beneficiaries. – A power to determine the beneficial enjoyment of the corpus or the income therefrom if the corpus or income is irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions).

(5) Power to distribute corpus. – A power to distribute corpus either –

(A) to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries) provided that the power is limited by a reasonably definite standard which is set forth in the trust instrument; or

(B) to or for any current income beneficiary, provided that the distribution of corpus must be chargeable against the proportionate share of corpus held in trust for the payment of income to the beneficiary as if the corpus constituted a separate trust.

A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary to beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(6) Power to withhold income temporarily. – A power to distribute or apply income to or for any current income beneficiary or to accumulate the income for him, provided that any accumulated income must ultimately be payable –

(A) to the beneficiary from whom distribution or application is withheld, to his estate, or to his appointees (or persons

named as alternate takers in default of appointment) provided that such beneficiary possesses a power of appointment which does not exclude from the class of possible appointees any person other than the beneficiary, his estate, his creditors, or the creditors of his estate, or

(B) on termination of the trust, or in conjunction with a distribution of corpus which is augmented by such accumulated income, to the current income beneficiaries in shares which have been irrevocably specified in the trust instrument.

Accumulated income shall be considered so payable although it is provided that if any beneficiary does not survive a date of distribution which could reasonably have been expected to occur within the beneficiary's lifetime, the share of the deceased beneficiary is to be paid to his appointees or to one or more designated alternate takers (other than the grantor or the grantor's estate) whose shares have been irrevocably specified. A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for after-born or after-adopted children.

(7) Power to withhold income during disability of a beneficiary. – A power exercisable only during –

(A) the existence of a legal disability of any current income beneficiary, or

(B) the period during which any income beneficiary shall be under the age of 21 years,

to distribute or apply income to or for such beneficiary or to accumulate and add the income to corpus. A power does not fall within the powers described in this paragraph if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children.

(8) Power to allocate between corpus and income. – A power to allocate receipts and disbursements as between corpus and income, even though expressed in broad language.

(c) Exception for certain powers of independent trustees. – Subsection (a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor –

(1) to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries; or

(2) to pay out corpus to or for a beneficiary or beneficiaries or to or for a class of beneficiaries (whether or not income beneficiaries).

A power does not fall within the powers described in this subsection if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus, except where such action is to provide for after-born or after-adopted children. For periods during which an individual is the spouse of the grantor (within the meaning of section 672(e)(2)), any reference in the subsection to the grantor

shall be treated as including a reference to such individual.

(d) Power to allocate income if limited by a standard. – Subsection (a) shall not apply to a power solely exercisable (without the approval or consent of any other person) by a trustee or trustees, none of whom is the grantor or spouse living with the grantor, to distribute, apportion, or accumulate income to or for a beneficiary or beneficiaries, or to, for, or within a class of beneficiaries, whether or not the conditions of paragraph (6) or (7) of subsection (b) are satisfied, if such power is limited by a reasonably definite external standard which is set forth in the trust instrument. A power does not fall within the powers described in this subsection if any person has a power to add to the beneficiary or beneficiaries or to a class of beneficiaries designated to receive the income or corpus except where such action is to provide for after-born or after-adopted children.

26 U.S.C. Section 675

§ 675. Administrative powers

The grantor shall be treated as the owner of any portion of a trust in respect of which –

> **(1) Power to deal for less than adequate and full consideration.** – A power exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party enables the grantor or any person to purchase, exchange, or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate consideration in money or money's worth.

(2) Power to borrow without adequate interest or security. – A power exercisable by the grantor or a nonadverse party, or both, enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security except where a trustee (other than the grantor) is authorized under a general lending power to make loans to any person without regard to interest or security.

(3) Borrowing of the trust funds. – The grantor has directly or indirectly borrowed the corpus or income and has not completely repaid the loan, including any interest, before the beginning of the taxable year. The preceding sentence shall not apply to a loan which provides for adequate interest and adequate security, if such loan is made by a trustee other than the grantor and other than a related or subordinate trustee subservient to the grantor. For periods during which an individual is the spouse of the grantor (within the meaning of section 672(e)(2)), any reference in this paragraph to the grantor shall be treated as including a reference to such individual.

(4) General powers of administration. – A power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of this paragraph, the term "power of administration" means any one or more of the following powers: (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; (B) a power to control the investment of the trust funds either by directing investments or reinvestments, or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of

stocks or securities of corporations in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; or (C) a power to reacquire the trust corpus by substituting other property of an equivalent value.

26 U.S.C. Section 676

§ 676. **Power to revoke**

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both.

(b) Power affecting beneficial enjoyment only after occurrence of event. – Subsection (a) shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event such that a grantor would not be treated as the owner under section 673 if the power were a reversionary interest. But the grantor may be treated as the owner after the occurrence of such event unless the power is relinquished.

26 U.S.C. Section 677

§ 677. **Income for benefit of grantor**

(a) General rule. – The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is,

or, in the discretion of the grantor or a nonadverse party, or both, may be –

(1) distributed to the grantor or the grantor's spouse;

(2) held or accumulated for future distribution to the grantor or the grantor's spouse; or

(3) applied to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse (except policies of insurance irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions)).

This subsection shall not apply to a power the exercise of which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event such that the grantor would not be treated as the owner under section 673 if the power were a reversionary interest; but the grantor may be treated as the owner after the occurrence of the event unless the power is relinquished.

(b) Obligations of support. – Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or cotrustee, may be applied or distributed for the support or maintenance of a beneficiary (other than the grantor's spouse) whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts

shall be considered to be an amount paid or credited within the meaning of paragraph (2) of section 661 (a) and shall be taxed to the grantor under section 662.

26 U.S.C. Section 678

§ 678. **Person other than grantor treated as substantial owner**

(a) General rule. – A person other than the grantor shall be treated as the owner of any portion of a trust with respect to which:

(1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or

(2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of sections 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

26 U.S.C. Section 679

§ 679. **Foreign trusts having one or more United States beneficiaries**

(a) Transferor treated as owner. –

(1) In general. – A United States person who directly or indirectly transfers property to a foreign trust (other than a trust described in section 404(a)(4) Or section 404A) shall be treated as the owner for his taxable year of the portion of such trust attributable to such property if for such year there is a United States beneficiary of any portion of such trust.

(2) Exceptions. – Paragraph (1) shall not apply –

(A) Transfers by reason of death. – To any transfer by reason of the death of the transferor.

(B) Transfers where gain is recognized to transferor. – To any sale or exchange of the property at its fair market value in a transaction in which all of the gain to the transferor is realized at the time of the transfer and is recognized either at such time or is returned as provided in section 453.

(b) Trusts acquiring United States beneficiaries. – If –

(1) subsection (a) applies to a trust for the transferor's taxable year, and

(2) subsection (a) would have applied to the trust for his immediately preceding taxable year but for the fact that for such preceding taxable year there was no United States beneficiary for any portion of the trust,

then, for purposes of this subtitle, the transferor shall be treated as having income for the taxable year (in addition to his other income for such year) equal to the undistributed net income (at the close of such immediately preceding taxable year) attributable to the portion of the trust referred to in subsection (a).

(c) Trusts treated as having a United States beneficiary. –

(1) In general. – For purposes of this section, a trust shall be treated as having a United States beneficiary for the taxable year unless –

(A) under the terms of the trust, no part of the income or corpus of the trust may be paid or accumulated during the taxable year to or for the benefit of a United States person, and

(B) if the trust were terminated at any time during the taxable year, no part of the income or corpus of such trust could be paid to or for the benefit of a United States person.

(2) Attribution of ownership. – For purposes of paragraph (1), an amount shall be treated as paid or accumulated to or for the benefit of a United States person if such amount is paid to or accumulated for a foreign corporation, foreign partnership, or foreign trust or estate, and –

(A) in the case of a foreign corporation, more than 50 percent of the total combined voting power of all classes of stock entitled to vote of such corporation is owned (within the meaning of section 958(a)) or is considered to be owned (within the meaning of section 958(b)) by United States shareholders (as defined in section 951(b)),

(B) in the case of a foreign partnership, a United States person is a partner of such partnership, or

(C) in the case of a foreign trust or estate, such trust or estate has a United States beneficiary (within the meaning of paragraph (1)).

26 U.S.C. Section 6012

§ 6012. Persons required to make returns of income

(a) General rule. – Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(b) Returns made by fiduciaries and receivers. –

(1) Returns of decedents. – If an individual is deceased, the return of such individual required under subsection (a) shall be made by his executor, administrator, or other person charged with the property of such decedent.

(2) Persons under a disability. – If an individual is unable to make a return required under subsection (a), the return of such individual shall be made by a duly authorized agent, his committee, guardian, fiduciary or other person charged with the care of the person or property of such individual. The preceding sentence shall not apply in the case of a receiver appointed by authority of law in possession of only a part of the property of an individual.

(3) Receivers, trustees and assignees for corporations. – In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. – Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

(5) Joint fiduciaries. – Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

26 U.S.C. Section 6151

§ 6151. Time and place for paying tax shown on returns

(a) General rule. – Except as otherwise provided in this subchapter, when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed, and shall pay such tax at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).

(b) Exceptions. –

(1) Income tax not computed by taxpayer. – If the taxpayer elects under section 6014 not to show the tax on the return, the amount determined by the Secretary as payable shall be paid

within 30 days after the mailing by the Secretary to the taxpayer of a notice stating such amount and making demand therefor.

(2) Use of government depositaries. – For authority of the Secretary to require payments to Government depositaries, see section 6302(c).

(c) Date fixed for payment of tax. – In any case in which a tax is required to be paid on or before a certain date, or within a certain period, any reference in this title to the date fixed for payment of such tax shall be deemed a reference to the last day fixed for such payment (determined without regard to any extension of time for paying the tax).

Supreme Court Rule 10

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

28 U.S.C. Section 960

§ 960. Tax liability

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

31 U.S.C. Section 3713

§ 3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when –

(A) a person indebted to the Government is insolvent and –

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

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